BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

1. The Defendant Was Deprived of His Constitutional Rights by the Admission in Evidence Against Him of Defendant's Income Tax Return, Made Under Compulsion of Federal Statutes, Which Provide Severe Pains and Penalties for the Failure to Make a Return, for Omitting from the Return Any Receipt of Money, Whether Lawful or Unlawful, Which May Be Income, or for Fraudulently Misstating or Omitting Any Item of Income.

This petitioner, Herbert W. Waguespack, received out of the proceeds of the contract between the Levee Board and Newman and Harris, a sum of approximately $46,000.00. He entered this amount on his income tax and returned it to the Bureau of Internal Revenue, which return he swore to as provided by law. The return was made long before the validity of the contract was questioned, and long before any prosecution had been begun, or any question of criminality in the transaction had been raised. Upon the trial of the case, for the purpose of showing that your petitioner had received this money, the Government offered in evidence a certified copy of his income tax return containing this amount. (Rec. Vol. 2, p. 1495; Vol. VI, p. 3595.) Your petitioner in due time and at the moment of offer objected to the receipt of the income tax return in evidence, which objection was overruled. (Rec. Vol. 2, pp. 1495-1497.)

The income tax return was clearly compelled by the revenue statutes of the United States and could, in no

sense, be said to be voluntary. *(The Revenue Act of 1936, Section 145 (a), 26 U. S. C. A., Internal Revenue Acts.)*

The Acts of Congress and Treasury Regulations 74, authorizing the use of income tax returns in any case in which the Government is interested in the result can only mean where the Government has an interest in the protection of its revenue and its taxing powers, and not in all cases where the Government has only a general and somewhat fictional interest, as it has in prosecutions for offenses in no wise connected with the Government fisc, revenue or taxing powers. This statement is borne out by the discussion in Congress when the bill was under consideration. *(Senate Proceedings—Congressional Record, Feb. 4-9, inc., 1926.)* There it was not even suggested that the return might be used in any and all prosecutions. The Statute provides for inspection only, and not use of the returns. Congress was conscious of the fact, of course, that if a statement was compelled by the Government to be made by an individual, that the use of that statement in evidence in a criminal prosecution for other offenses would be a violation of the constitutional provision against compelling a person to be a witness against himself.

If a statute permits the use of income tax returns against the maker in a prosecution for a criminal offense not connected with the Federal Revenue, then the statute is unconstitutional. If the statute merely means that it may be used only in cases where the return itself is part of the *res gestae*, then the statute is constitutional, and it requires no citation of authorities to establish the rule

that where a statute is susceptible to two constructions, one of which will make it unconstitutional and the other constitutional, the Courts will always adopt the construction which upholds the constitutionality of the Statute.

The 16th Amendment carries not the slightest implication that it repeals or modifies the Fifth Amendment. The law is and always has been during the history of this Government that any compulsion in the giving of testimony or a statement, sworn to or unsworn, presupposes and grants immunity to the person making such statements from any punishment, or the use of such statement in order to establish guilt of the person making the statement in any criminal matter, and that one's private papers are not only immune from search and seizure, but that they may not be used against the owner for the purpose of incriminating him unless he voluntarily surrenders them. All of the elements of compulsory incrimination are present in this case: 1. The making of the statements is coerced by penalty of fine and imprisonment; 2. They were used over the objection and to the detriment of the person thus compelled to make the statement; 3. The statements are compelled to be made under oath; 4. The private papers of the defendant were unlawfully seized and used to his detriment; and 5. He was given no opportunity and had no opportunity of protecting himself from the use of the thus coerced statements.

It is suggested in the opinion of the Circuit Court of Appeals that he should have claimed his immunity at the time of making the income tax return, or should have omitted the items in dispute from his return. We suggest

that this holding of the Circuit Court of Appeals is untenable. There is no way, no opportunity and no manner in which such a claim of immunity could be made and no person or office to which it could be made. Your petitioner was incapable of defending himself at the time of making his income tax return from the use which was made in the trial of this return, because he had at that time no knowledge nor even suspicion that this prosecution would ever arise, and being unconscious of attack, was incapable of defense. The second suggestion of the Court that the item be omitted from the income tax return merely means that petitioner should commit another crime in order to be able to claim his immunity when a future prosecution, not then in being, not even contemplated or expected, might be brought against him. The holding that a person should commit a criminal offense in order to preserve his constitutional rights is unique and untenable.

We offer to the Court a few of the leading authorities on this subject:

Thomas Bram vs. U. S., 168 U. S. 532, Syl.: .....

> "4. A confession which is not voluntary is not admissible in evidence under the Fifth Amendment to the Federal Constitution, declaring that no person shall be compelled in a criminal case to be a witness against himself."
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> "5. The voluntary character of an alleged confession depends upon the question whether the making of the statement was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not."

Mr. Wharton in his *Criminal Evidence,* page 1377, Vol. 2, says:

> "Confessions of accused, where compelled to answer under oath".
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> "But the testimony of an accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn and examined, not on his own motion, but on the motion of the prosecution. This rule is founded upon the unreliable as well as the inquistorial character of such statements."

In *Boyd vs. U. S., 116 U. S. 634; 29 L. E. 746:*

> "SUITS FOR PENALTIES AND FORFEITURE".
>
> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment."

In the case of *U. S. vs. Edgerton, 80 Fed. 374,* the Court said:

> "It is fatal to an indictment that the defendant was called to testify before the Grand Jury in the par-

> ticular matter from which it resulted, without being informed or knowing that his own conduct was the subject under investigation".

In *Counselman vs. Hitchcock, 142 U. S. 551, 35 L. E. 114,* it was held:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself, had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard".
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> *C. F. Edwards vs. U. S., 85 L. Ed. 563.*

Authorities without end could be added to show the universal application of this rule and a clearer violation of the constitutional protection and immunity of the accused could hardly be imagined.

2. The Constitutional Privilege of the Defendant of Trial by Jury Is Violated by Empanelling Two Alternate Jurors, Making a Jury of Fourteen.

The phrase "trial by jury" as used in the Constitution, is derived from the Common Law as it existed at the time the Constitution was adopted, and means a jury of twelve, no more, no less, *(Patton vs. U. S., 281 U. S. 287, 74 L. E. 854),* and any change or variation in the number

of jurors made or attempted to be made by Congress is a violation of the Constitutional provision and null and void.

Thompson vs. Utah, 170 U. S. 343, 42 L. Ed. 1061, 18 Supreme Court 524.
Maxwell vs. Dow, 176 U. S. 581, 44 L. E. 597, 20 Supreme Court 48.
American Publishing Co. vs. Fisher, 166 U. S. 464-468.
In re: Debs, 158 U. S. 564.

While it may be said that the alternate jurors do not necessarily decide the case, still if one or more of the regularly empanelled jurors becomes incapacitated during the trial, either one or both of the alternate jurors then become regular jurors and part of the originally empanelled jury. In the meantime they sit with and mingle with the twelve original jurors, and may take part in any discussion of the case or the evidence or the circumstances with the members of the original jury before the issue is finally submitted to the jury at the close of the evidence, arguments and Judge's charge. To all of these things they listen with the originally empanelled jurors, co-mingle with them and may discuss and remark upon the evidence and incidents of the trial, thereby either influencing or at least distracting the opinions of members of the original jury.

Under such circumstances it cannot be said that the original jury is not subject to outside influences beyond the influence of the members of the original jury. It is plain that "the trial by jury" means not only a decision by a jury of twelve, no more and no less, but that it also means that in receiving the evidence, in weighing the

arguments and applying the charge of the Court, that no other person shall be allowed to in any way distract, influence, or persuade the judgment and the consideration of the elements of the trial except the original twelve jurors.

The province of the jury is not only their final verdict, but is also the influences, the considerations, the impression and the discretion and judgment of the jury which motivates them in arriving at their final judgment.

It has repeatedly been held that the co-mingling with the jury of persons other than the fellow members of the jury, even the officers of the court, in their consideration of the case and the impressions that are made upon their minds concerning the issues of the trial by the evidence, arguments and charge of the Court, will vitiate a verdict for the reason that, under such circumstances, the verdict is not the free, untrammelled, uninfluenced and undistracted consideration and judgment of the jurors.

So true is this that any discussion by an outsider with the jury or members of the jury is presumed to have interfered with their free judgment, and it is not necessary to show that they were actually swayed by such discussions or comments, and the verdict is vitiated without any showing of positive injury.

If fourteen men may sit upon a jury, hear the evidence, the arguments and the charge of the court, then any unlimited number may so sit, even to the entire population of a whole community, so long as the actual ver-

dict is fathered and adopted by the twelve originally drawn, if none of the original twelve be incapacitated or unable to serve to the end of the trial. If two alternates may be drawn, then twelve may be drawn, or any other number may be drawn without violating the constitutional rights of the accused.

If such be the case it is plain that the mere association of the twelve original members of the jury with any number of persons more than twelve is certain to sway their judgment and interfere with their discretion by the effect which the sympathies, the opinions and the leanings of the whole crowd of persons may have upon each other; although there may be no concrete evidence of effect, yet we all know that the intangible ideas of a number of persons sway the ideas and judgments of the individuals composing an assembly.

If the actual rendering of the verdict is alone meant by the term "trial by jury" then we repeat that a whole community may be called to hear and consider a case, so long as a verdict is rendered by the first twelve persons selected. That this is not the case and that "trial by jury" means the action of the jury mentally and decisive upon the whole case, and not merely the rendering of a verdict, is too plain for discussion, and is manifested by the whole theory of the Anglo-Saxon law, by the common law and the American Constitution, Statutes and jurisprudence.

The Circuit Court of Appeals refused to examine the constitutional question here raised because the alternate

jurors were excused before the case was submitted for decision to the twelve first chosen, and that, consequently, no harm was done. In order to arrive at that conclusion the court "PRESUMED" that the alternate jurors did not discuss the case with the other jurors. The rule is well settled that where, in the course of a trial, the constitutional rights of the accused are violated, the question as to whether or not the violation of these rights had any harmful effects should not be considered, otherwise the Constitution may be violated with impunity, and in every case the question would be, not whether the Constitution was, indeed, violated, but what effect that violation had in the opinion of the particular court considering the matter. That is not the law. Where the constitutional rights of the accused are invaded and violated, the whole proceeding is nullified.

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure".
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> *Boyd vs. U. S., 116 U. S. 616-641, 29 L. E. 752.*

We also refer Your Honors to:

Ex Parte Siebold, 100 U. S. 376, 25 L. E. 719.
Ex Parte Yarbrough, 110 U. S. 654, 28 L. E. 274.
Ex Parte Royall, 1117 U. S. 248, 29 L. E. 870.
Counselman vs. Hitchcock, 142 U. S. 585, 35 L. E. 1114.
Pierre vs. State, 306 U. S. 354, 83 L. E. 757.
Norris vs. Alabama, 294 U. S. 587, 83 L. E. 757.
Hale vs. Kentucky, 303 U. S. 613, 79 L. E. 1074.

3. The Defendant Was Deprived of His Constitutional Guarantee of a Trial by Due Process of Law When the Assistant Attorney General in Charge of the Prosecution Improperly Joined With the Public Press and Partisan Politicians and by Statements and Interviews Made and Given by Him Before the Trial, and His Conduct During the Trial Created Such a Great and Bitter Prejudice Against the Accused as to Preclude the Possibility of His Obtaining a Fair and Impartial Trial by a Fair and Impartial Jury, Undisturbed by Political Prejudice and Public Clamor, and Where a Continuance Until the Pending Election Was Over and the Public Excitement and Prejudice Had Subsided, Was Denied by the Trial Court.

We submit to the Court that this is not merely a complaint that a continuance was denied, but a complaint that defendant was denied due process of law because of public clamor and prejudice deliberately created and fanned by the Assistant Attorney General and his associates for the purpose of bringing the defendant into such public ridicule and disrepute as to make it impossible to obtain a fair and impartial trial. Prospective jurors were coerced, intimidated and influenced by statements that in a previous trial, in which one of these defendants was accused, the jury was bribed and corruptly influenced to acquit the accused; that the Assistant Attorney General was investigating that jury for the purpose of prosecution, although he knew that if any offense had been committed, it was prescribed. The Assistant Attorney General and his aides had conferences with the reporters and representatives of the press and issued almost daily statements of his intention to prosecute, of his intention to send many people to the penitentiary,

and of his belief in the guilt of these defendants and many others. The result of the publication of these statements and the bitter antagonism of the partisan press was such that no juror with any self-respect could fail to fear that he would be subject to contempt and abuse and suspicion of corruption and bribery if he rendered a verdict in favor of the accused. Not only was this true of the citizens called for jury service, but it was also true of citizens who might be called as tales jurors so that the selection of a fair and impartial jury, and the use of the defendant's peremptory challenges was made impossible because the real objection to them was intangible, in that they feared an attack upon their self-respect and reputation in the community, which, of course, they would not admit under questioning, and that this intangible source of partiality permeated the whole array of jurors called during the term of court in which this case was tried. The Court of Appeals characterized the conduct of the Assistant Attorney General as being "improper"; found that the attack upon the defendant by the newspapers and the Assistant Attorney General amounted to an "abuse" and that the newspapers had "gone too far", in their articles discussing the case. The trial Judge found it necessary during the trial to punish for contempt certain representatives of a newspaper and its officials, but refused a motion to withdraw a juror and declare a mistrial.

This conduct on the part of the Assistant Attorney General, the newspapers and partisan politicians, was a deliberate and successful attempt to deprive the defendant

of a fair and impartial trial and, in consequence, of due process of law.

C. F. Berger vs. U. S., 295 U. S. 78.

As Your Honors said in *Dempsey vs. Moore*, 261 U. S. 86, 67 L. E. 545, where the jury was overawed by public opinion in the community to such an extent that they were prevented from considering the defense of the accused and were afraid to render a verdict in their favor, that the accused had been denied due process of law and had not had a trial at all; that the whole proceeding was stricken with nullity and was entirely void.

Frank vs. Mangum, 237 U. S. 309, 335; 59 L. E. 983.

4. A State Offense of Bribery Is Not Cognizable Under the Mail Fraud Statute and Does Not Constitute a Scheme to Defraud Within the Meaning of That Statute When an Otherwise Meritorious Contract Which Is Bound to Result in a Profit to the Allegedly Defrauded Party Has Been Obtained by the Bribery of a Public Official.

Petitioner made full proof that his participation in the profits of the contract was not bribery under the Louisiana statutes, but, on the contrary, that under said statutes he had a right to enter into and participate in the profits of the transaction.

But we assume for the purpose of this argument that the contract between Newman and Harris and the Levee Board had been procured through the bribery of this petitioner.

The Appellate Court held that such bribery would constitute a scheme to defraud within the meaning of the mail fraud statute, for the reason that "no trustee has more sacred duties than a public official, and any scheme to corrupt such a one must, in the Federal law, be considered a scheme to defraud, *because of the essential immorality of an arrangement of that sort*". We contend, however, that such bribery is merely a state offense, and not an offense under the mail fraud statute; that the essential immorality of an arrangement of that sort or of *any scheme*, is NOT sufficient to bring it within the scope and intendment of the mail fraud statute.

Your Honors have repeatedly held that "there are no common law crimes against the United States"; that "regard must ALWAYS be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown PLAINLY AND UNMISTAKABLY constitute an offense within the meaning of an Act of Congress"; that "Statutes creating crime are to be strictly construed in favor of the accused and may not be held to extend to cases not covered by the word used"; and that "before one may be punished it must appear that his case is PLAINLY within the statute".

U. S. vs. Eaton, 144 U. S. 677.
Donnelly vs. U. S., 276 U. S. 505.
Fasulo vs. U. S., 272 U. S. 620.
U. S. vs. Resnick, et als, 299 U. S. 207.
U. S. vs. Wiltberger, 5 Wheaton 76.
U. S. vs. Lacher, 134 U. S. 624.
U. S. vs. Chase, 135 U. S. 255.

The crime of bribery was recognized by Congress as a separate crime, when it enacted Section 39 of the Crim-

inal Code. Bribery is not covered PLAINLY AND UNMISTAKABLY by the provisions of Section 215 of the Criminal Code. That Section PLAINLY covers many varied offenses through the use of the mails, but bribery is not one of them; it denounces not only schemes to defraud or for obtaining money or property by means of false pretenses, representations or promises, but also specifically denounces the use of the mails for counterfeit or spurious coins, paper money, etc.,—for certain specific swindles,—and for dealing in certain green goods and articles, etc. *By its very language,* the statute is *limited* to the many specific offenses punishable therein.

In construing the meaning of a "scheme to defraud" Your Honors held, in the case of *Fasulo vs. U. S.*, 272 U. S. 620, that the language of the mail fraud statute was not broad enough to embrace "all means that are dishonest" and "all dishonest methods or schemes"; that the obtaining of money by means even more reprehensible than false pretenses was not enough to bring such schemes within Section 215; that the obtaining of money by threats to injure or kill, by the use of the mails for that purpose, did not constitute an offense under the mail fraud statute.

If schemes more reprehensible than false pretenses do not necessarily come within the scope of Section 215, it follows that the essential immorality of a scheme is NOT sufficient to constitute a scheme to defraud, and that the Appellate Court erred in so holding.

A scheme to defraud requires, 1, an intended or actual pecuniary or property injury, and, 2, the specific means

of deception to bring about the deprivation or injury that is intended or inflicted. There are many statutory crimes which consist of pecuniary or property injury, but which are not schemes to defraud, such as coercion, robbery, embezzlement, extortion, and forgery. All these are statutory crimes denounced by specific statutes, and althought they all involve pecuniary or property injury, they are differentiated by the means used to effect that end. In the *Fasulo case, supra,* Your Honors held that a scheme to inflict pecuniary or property injury by means of threats to injure or kill, was not a scheme to defraud. In *Norton vs. U. S.*, 92 Fed. (2nd) 753, it was held that coercion did not constitute a scheme to defraud because the means used was not deception. In *Naponiello vs. U. S.*, 291 Fed. 1008, it was held that although obtaining money through threats is a more heinous crime than obtaining money through deception, such a case was not within the mail fraud statute because threats are not deceits. In *U. S. vs. Smith,* 29 Fed. (2nd) 926, it was held that embezzlement did not come within the mail fraud statute. In the case of *Harrison vs. U. S.*, 200 Fed. 662, after an exhaustive review of the authorities, the Court held that there could be no scheme to defraud when the money or property is not to be obtained by deception as to the substantial identity and essentials of that which may be promised or undertaken.

The crime denounced by Section 215 is the ancient crime of obtaining money or property by means of false pretenses. Bribery is neither a false pretense nor a false representation nor a false promise. In the common law, it has always existed as a crime separate from and inde-

pendent of the crime of obtaining money by false pretenses. When Congress passed the Mail Fraud Statute, it knew that bribery was a separate crime, as shown by Section 39 of the Criminal Code.

We contend that bribery is not punishable under Section 215 any more than extortion, coercion, and embezzlement. It is persuasive that Congress in enacting statutes to punish offenses against operations of Government, 7 Fed. Code Ann., Title 18, Chap. 4, as distinguished from offenses against the Postal Service, recognized the differences which exist between the various crimes which involve the deprivation of property, and expressed the necessity and intention to pass specific statutes to punish these various offenses. These laws are contained in Sections 27 to 84, inclusive, of the Criminal Code, and provide punishment for the various offenses of forgery, embezzlement, fraud, extortion, robbery, counterfeiting and *bribery*. Bribery is covered by Section 39 of the Criminal Code and it is inconceivable that Congress would have passed Section 39 if it intended that the crime of bribery be punishable under some other of the foregoing Sections. When Congress came to consider offenses against the Postal Service, however, it *did not* include bribery any more than it did extortion or coercion, in spite of the fact that it did provide for the punishment of a great many other crimes against the Postal Service.

If Congress HAD specifically provided in Section 215 that the use of the mails for bribery was an offense, there would be no question that bribery was cognizable under that Statute. But this extraordinary situation

arises: The defendants in this case could not have been convicted under such a specific statute, because no count of the indictment charges that the mails were used for bribery. And yet, if the obtaining of a contract by means of bribery and the subsequent use of the mails in the execution of that contract constitutes a scheme to defraud within the meaning of Section 215, then the Statute is now *more potent* to punish the crime of bribery than it would be if the use of the mails for bribery was specifically punishable under that statute. It would seem, therefore, to be against all reason to say that the offense of bribery falls within the scope of the mail fraud statute.

5. There Can Be No Scheme to Defraud When the Scheme Is Such That the Only Thing the Accused Can Obtain Is a Stipulated Percentage of What They Themselves May Create and Produce for Another, Because Such a Scheme Cannot Result in Pecuniary or Property Injury to the Alleged Victim.

Your Honors, in the case of *Hammerschmidt vs. U. S.*, 265 U. S. 182, (which was a prosecution under Section 37 of the Criminal Code, which punishes *conspiracies to defraud* the United States, *"IN ANY MANNER AND FOR ANY PURPOSE")* took occasion to consider the opinion in the case of *Horman vs. U. S.*, 53 C. C. A. 570, (which was a prosecution under the mail fraud statute which is involved here), and Your Honors said that the decision in the *Horman case "should be confined to pecuniary or property injury"*.

While the question was not before Your Honors for decision, Your Honors apparently drew a distinction be-

tween prosecutions under Section 37 of the Criminal Code and under Section 215, to the effect that prosecutions under Section 215, should be confined to pecuniary or property injury.[1]

Subsequently, in the case of *Fasulo vs. U. S.*, 272 U. S. 620, Your Honors cited with approval the comment on the *Horman case* that Your Honors had made in the *Hammerschmidt case.*

We, therefore, conclude, while it has never been specifically settled by Your Honors, that no prosecution will lie under the mail fraud statute, unless there is an actual or contemplated pecuniary or property injury. This conclusion is further strengthened by a consideration of the meaning of actual civil fraud, as distinguished from constructive fraud, as found in the textbooks and the jurisprudence, where one of the essentials of actual fraud is that "loss or damage must result." [2]

In this case, the only way in which pecuniary or property injury could have been inflicted or intended was by means of the contract. There was no other way in which the accused could obtain or hope to obtain money or property from the Board.

But, the only thing that could be obtained from the Board by means of the contract was 25% of whatever savings and gains would be effected, through the refund-

[1] Under the express words of the Statute there need not be an actual pecuniary or property injury and it is sufficient if such injury is intended or contemplated.

[2] Under the mail fraud statute, the fraud, i. e., the loss or damage need not result if it has been intended or contemplated, but "LOSS OR DAMAGE" must still be intended or contemplated.

ing operations, *by the defendants themselves,* through their skill and expenditures. Those savings and gains had no prior existence, either actual or probable, and were created only by the defendants. The Levee Board, before the contract was made, had no right of property in those savings and gains, which were not only not in *esse,* but which it had no reasonable hope of obtaining without the defendants. Nothing in an indictment can be taken by intendment. The indictment did not charge, and of course there was no proof offered, that the Board would or could have otherwise made any savings and gains at all, through refunding operations conducted by itself or through anyone else, or had any reasonable hope of doing so.

The Board, therefore, had no property right in the savings and gains made by the defendants through refunding operations, except the right it acquired, through the contract, to 75% thereof. If *pecuniary or property injury* was inflicted or intended, it could only be as to that 75%.

That there was no INTENTION to deprive the Board of that 75% is shown by the contract itself. The defendants could not have intended to deprive the Board of any part of that 75% when they specifically contracted in writing to give that 75% to the Board. Nor was it proven that the Board HAD BEEN fraudulently deprived of any part of that 75%. The only charge in the indictment as to that was that the savings and gains had not been computed at their present value, or under the present worth theory, and that to that extent the Board had been de-

prived of part of its 75%. But the Court of Appeals found that while the savings and gains should have been reduced to their present value at a rate of discount justly applicable, the computation made on a mathematical basis indicated only fraud or mistake in a civil proceeding, and that the Court "would hesitate, under the testimony, to uphold a criminal conviction on this alone". (Rec. Vol. 8, pp. 4821, 4822.)

If it be true, as found by the Appellate Court, that no criminal fraud was proven as to the 75% of the savings and gains that the Board acquired by the contract, then it necessarily follows that no criminal case was proven at all, because there was no intention to deprive and no actual deprivation of any money or property, within the meaning of the Mail Fraud Statute.

There was no intended pecuniary or property injury, within the meaning of ANY LAW, MUCH LESS the Mail Fraud Statute. The contract, far from intending or causing any pecuniary or property injury, was a contract by which the Board obtained a pecuniary or property benefit that it would not otherwise have obtained or been entitled to. To put it another way, there can never be pecuniary or property injury when the only thing the accused can obtain or hope to obtain is a contingent part of WHAT THEY THEMSELVES PRODUCE and bring into being, because such a scheme necessarily contemplates pecuniary or property BENEFIT to the supposed victim, and cannot possibly cause any loss or damage.

We respectfully pray that Your Honors review this case to determine whether or not any pecuniary or property

injury was intended or inflicted by the contract in this case. If it was not, the convictions should be reversed.

In further support of this petition for a writ of certiorari, we adopt, by reference for the sake of brevity, those reasons and arguments presented by the other defendants in this case who have filed separate petitions.

CONCLUSION.

We respectfully urge that the issues raised by this case are serious and important ones, involving questions of constitutional law and of construction of a Federal Statute, which the Government has sought to extend beyond the meaning of its terms, that some of these questions have never been passed upon by Your Honors, and that a writ of certiorari should issue.

Respectfully submitted,

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